In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1668

MAMDOUH BARBOUR, PETITIONER

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner attacks the court of appeals' affirmance of the district court's denial of his habeas corpus motion for admission to bail pending deportation proceedings. He contends that confidential information was improperly used to determine that he was a national security risk and not entitled to bail.

Petitioner is a native and citizen of Syria, and a major in the Syrian Army (R. 178).[1] He left Syria on February 10, 1972, and entered Canada on February 19, 1972 (R. 119-121). Shortly thereafter, petitioner deposited approximately $115,000 in four different Canadian banks (R. 4). On March 4, 1972, he entered the United

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[1] "R." denotes the administrative record of the Immigration and Naturalization Service relating to petitioner.

States at Chicago, Illinois, on a non-immigrant visa based on a fraudulent passport issued by the Imamate of Oman State to Yousef S. Risk (R. 178-180, 227).

Subsequent to petitioner's entry into this country, the Syrian government, acting through Interpol, informed the Immigration and Naturalization Service that petitioner's true name was Mamdouh Barbour and that a warrant for his arrest had been issued by Syrian authorities on February 11, 1972, for escape abroad, smuggling of public funds, violation of military instructions, and misappropriation of two million Syrian pounds, the equivalent of $458,909.26. The Syrian government also began proceedings in Canada to recover the money deposited there. The Syrian government alleged that petitioner was vice head of the Finance and Administration Department of his army unit[2], that he had embezzled funds in his possession, and that when it became apparent that he would be discovered, he fled the country (R. 187-200; 214-219).

On May 24, 1972, petitioner was apprehended by the Immigration and Naturalization authorities in Arlington, Texas, and deportation proceedings begun (R. 169-170, 179). Petitioner was notified that he would be retained in custody pending final determination of deportability (R. 34). Petitioner submitted an application for stay of deportation, pursuant to 8 U.S.C. 1253(h), claiming that he would be subject to persecution in Syria because of his political beliefs (R. 171-180).

On August 14, 1972, the record of proceedings before a Special Inquiry Officer was forwarded to the Office of Refugee and Migration Affairs of the Department of

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[2]The court of appeals stated that petitioner was assigned to SAIQA, a Syrian supported military arm of the Palestinian resistance, said to have connections with worldwide terrorist organizations (Pet. App. 2a).

State with a request for comments as to whether petitioner's deportation would subject him to persecution because of his political opinions. The Department of State responded that petitioner had not established that he would be subject to political persecution if returned to Syria (R. 231-232). On September 8, 1972, the Special Inquiry Officer found petitioner deportable as charged and denied his application for withholding of deportation (R. 75-78).[3]

Petitioner appealed to the Board of Immigration Appeals on September 19, 1972, from the decision of the Special Inquiry Officer (R. 72-73). He also requested redetermination of his custody status and allowance of bond, pursuant to 8 C.F.R. 242.2(b). By decision dated October 5, 1972, the Special Inquiry Officer ordered that no change be made in petitioner's custody status (R. 24-25). This decision was also appealed to the Board of Immigration Appeals (R. 22).

On October 17, 1972, the Board of Immigration Appeals heard argument on the appeal from denial of bail. At that time, counsel for the Immigration and Naturalization Service stated that petitioner was not a security risk (R. 16). After the case was taken under advisement, the Board received a letter dated October 27, 1972, from the Office of Refugee and Migration Affairs, Department of State, recommending that petitioner not be set free on bail. That recommendation was based upon information from "intelligence sources" that petitioner was assigned to serve with the Syrian supported military arm of the Palestinian resistance movement. On the basis of this information, and other material in the form of classified

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[3]In accordance with petitioner's stated choice, he was ordered deported to Brazil or alternately, if that country will not accept him, to Jordan or Syria (R. 78).

information, specifically required to be kept secret by Executive Order 11652, 37 Fed. Reg. 5209, the Board of Immigration Appeals held that petitioner's release on bail would endanger the national security of the United States (R. 2-7). Accordingly, on November 24, 1972, the Board dismissed the appeal on the bond proceedings. The Board declined to rule on whether petitioner was a good bail risk absent the security issue.[4]

On December 12, 1972, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. The district court reviewed *in camera* the various confidential documents relating to whether petitioner was a security risk, but did not consider or rely upon these documents in its order of January 23, 1973, denying the application for relief (Pet. App. 20a). The district court specifically found that petitioner was not a security risk (as the Board of Immigration Appeal had found) but concluded that he was not a good bail risk (Pet. App. 20a-24a). Accordingly, the court held that the Attorney General's decision to deny bail was not an abuse of discretion.

The court of appeals affirmed (Pet. App. 11a). In its view, review of the administrative determination to deny bail is limited solely to the reason advanced by the Board of Immigration Appeals, that petitioner was a security risk (Pet. App. 6a).[5] Based on an *in camera* inspection of the confidential information relied upon by the Board, the court of appeals concluded that there was ample basis for finding that petitioner was a security risk (Pet. App. 7a-10a).

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[4]In a separate decision, the Board remanded the deportation case to the Special Inquiry Officer for further hearing on the issue of persecution. This issue is still pending.

[5]The court of appeals noted that while the appeal was pending, the Board of Immigration Appeals, in proceedings initiated by petitioner, found that petitioner was also a bail risk (Pet. App. 6a).

Petitioner contends (1) that the denial of bail pending deportation proceedings based on confidential information constitutes a violation of due process and (2) that the Board of Immigration Appeals is not authorized to utilize confidential information to deny bail. These claims were thoroughly considered and properly rejected by the court of appeals, in an opinion on which we rely. The court stated (Pet. App. 7a-10a):

> It is not altogether clear on what basis the district court found "for the record" that Barbour did not present a threat to national security. It does seem from our view of the evidence, however, that in reaching that conclusion the court must have used an overly severe standard of review. The Immigration and Naturalization Act of 1952 vests wide discretion in the Attorney General and his delegates to determine whether or not to release an alien on bail pending a final decision in deportation proceedings. Section 242(a) of the Act provides in pertinent part:
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> "Pending a determination of deportability in the case of any alien * * *, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may *in the discretion of the Attorney General,* and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole."

8 U.S.C. §1252(a). (Emphasis supplied.) The wording in Section 242(a) is virtually identical to that in Section 23 of the Internal Security Act of 1950. In reviewing the legislative history of the earlier Act, the Supreme Court said: "[T]he language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse. * * * [The discretion of the Attorney General] can only be overridden where it is clearly shown it 'was without reasonable foundation' ". *Carlson* v. *Landon,* 1952, 342 U.S. 524, 540-541, 72 S. Ct. 525, 534, 96 L. Ed. 547, quoting *United States ex rel. Potash* v. *District Director,* 2 Cir. 1948, 169 F. 2d 747, 751. Courts that have reviewed decisions denying aliens bail since the 1952 Act have, apparently unanimously, transferred the presumption to cases under that Act. See, e.g., *United States ex rel. Belfrage* v. *Shaughnessy,* 2 Cir., 212 F. 2d 128 at 129; *Application of Maringolo,* S.D.N.Y. 1969, 303 F. Supp. 1289, 1292. Under Section 242(a), therefore, an alien has a heavy burden to establish that the Attorney General abused his discretion. See *United States ex rel. Nukk* v. *District Director,* 2 Cir. 1953, 205 F. 2d 242, 244. The test established in the *Carlson* case is, we think, essentially that typically used in habeas corpus review of administrative action —whether there is any basis in fact for the agency's decision. See *Developments in the Law—Habeas Corpus,* 83 Harv. L. Rev. 1038, 1238-63 (1970). Here the evidence more than adequately supports the Board's finding that Barbour is a security risk.

There is no question of the Attorney General's discretion under Section 242(a) of the Act to continue an alien in custody during deportation proceedings upon a properly-made determination that the release of an alien would be a danger to the national security of the United States. *Carlson* v. *Landon, supra.* Barbour contests, however, the manner in which that determination was reached by the Board. Barbour argued in his petition for habeas corpus, and he argues before this Court, that he was denied due process of law when the security risk information was presented *ex parte* to the Board without his having an opportunity to refute it. He contends also that the Board had no authority to consider evidence not presented to the Special Inquiry Officer; nor did it have authority to consider confidential information in connection with bail. He argues that the Board could not decide the issue of Barbour's being a national security risk when the issue at the hearing, as conceded by the Immigration and Naturalization Service, was solely whether Barbour was a bail risk.

We reject these contentions. Discretionary relief— and release on bail is a form of discretionary relief— may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security, if the use of such information is sanctioned by regulations. *Jay* v. *Boyd,* 1956, 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242; *United States ex rel. Dolenz* v. *Shaughnessy,* 2 Cir. 1953, 206 F. 2d 392, 394-395. Regulations specifically provide that "[t]he determination of the special inquiry officer as to custody status or bond may be based upon any information which is available to the

special inquiry officer, or which is presented to him by the alien or the Service." 8 C.F.R. 242.2(b) (1973). Regulations also direct the Board of Immigration Appeals to "exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." 8 C.F.R. 3.1(d) (1973). The Board therefore, may base its decision on any information available to it.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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[6]Contrary to petitioner's claim, the decision of the District of Columbia Circuit in *Han-Lee Mao* v. *Brownell*, 207 F. 2d 142 (C.A.D.C.), is not in conflict with the holding here. There, a Chinese alien sought injunctive relief from an order of the Attorney General which denied him permission to return to mainland China. The Immigration and Naturalization Service had denied Mao permission to return to China as that country's armies were engaged in hostilities with United States military forces in Korea and Mao's training and education might be utilized by enemy forces. *Id.* at 144-145. The court of appeals held that Mao was entitled to a hearing before he could be detained against his will. *Id.* at 147. The court in *Mao* did not indicate the procedural requirements that must exist at the subsequent hearing nor did they hold that confidential information relating to national security must be released to satisfy the dictates of due process. Here, as we have noted, petitioner is entitled to and has received a full and fair hearing in compliance with the requirements of *Mao*. Accordingly, no conflict exists between the two holdings.